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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 630

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COMMISSIONER OF CORPORATIONS AND
TAXATION, *Petitioner,*

v.

EDWARD H. FLAHERTY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS
AND
BRIEF IN SUPPORT THEREOF.

PAUL A. DEVER,
Attorney General,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

*To the Honorable the Chief Justice of the Supreme Court
of the United States and the Associate Justices thereof:*

Henry F. Long, as he is Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, presents this petition for a writ of certiorari and prays that it may issue to review a decision of the Supreme Judicial Court for the Commonwealth of Massachusetts rendered on July 3, 1940, ordering that abatement be granted by the Appellate Tax Board of Massachusetts of an income tax assessed upon the respondent by the petitioner under authority of St. 1933, c. 307, sec. 9, as amended by St. 1937, c. 395, sec. 1, and of General Laws, c. 62. Final orders making such abatement in accordance with the rescript from the

Supreme Judicial Court were entered on September 16, 1940. These final orders constitute the final judgment of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts in which a decision could be had.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (R. p. 37) is reported in 28 N.E. (2d) 433, and may also be found in Massachusetts Adv. Sh. (1940) at page 1229. The opinion of the Massachusetts Appellate Tax Board (R. p. 20) is reported in Massachusetts A.T.B. (1940) at page 5.

Jurisdiction.

The jurisdiction of this court is invoked under section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 937, 28 U.S.C. sec. 344 (b). The final order or judgment of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts in which a decision could be had, was entered September 16, 1940 (R. p. 44). The appellate jurisdiction of this court is properly invoked because there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the constitution and laws of the United States as well as for the reason that one of the parties claims immunity under the constitution and under the statutes of the United States.

Question Presented.

The principal question presented is whether the personal income tax imposed by Massachusetts (see Massachusetts

G.L. c. 62, sec. 1; also Massachusetts St. 1933, c. 307, sec. 9, as amended by Mass. St. 1937, c. 395) can constitutionally apply to dividends (or interest) received by an individual inhabitant of Massachusetts from the Worcester Cooperative Federal Savings and Loan Association on share accounts owned by said inhabitant, an exemption being granted by law with respect to dividends received from a Massachusetts Cooperative Bank.

Statutes Involved.

Massachusetts St. 1933, c. 307, sec. 9, as amended by St. 1937, c. 395, sec. 1, and as in effect at the time in question, provides as follows: "*Section 9.* Income received by any inhabitant of the commonwealth during the years nineteen hundred and thirty-three, nineteen hundred and thirty-four and nineteen hundred and thirty-five from dividends on shares in all corporations, joint stock companies and banking associations, organized under the laws of this commonwealth or under the laws of any state or nation, except co-operative banks, building and loan associations and credit unions chartered by the commonwealth, and except savings and loan associations under the supervision of the commissioner of banks, and income received by any inhabitant of the commonwealth during the years nineteen hundred and thirty-six, nineteen hundred and thirty-seven and nineteen hundred and thirty-eight from such dividends, other than stock dividends paid in new stock of the company issuing the same, shall be taxed at the rate of six per cent per annum. Inhabitant of the commonwealth shall include (a) estates and fiduciaries specified in sections nine, ten, thirteen and fourteen of chapter sixty-two of the General Laws, as appearing in the Tercentenary Edition, (b) partnerships specified in section seventeen of said chapter sixty-two, as so appearing and (c) partnerships, associations or trusts,

the beneficial interest in which is represented by transferable shares, specified in paragraphs entitled First, Second and Third of subsection (c) of section one of said chapter sixty-two, as amended. Except as otherwise provided in this section, the provisions of chapter sixty-two of the General Laws, as amended, shall apply to the taxation of income received by any such inhabitant during said years. Subsection (b) of section one of said chapter sixty-two shall not apply to income received during said years."

General Laws of Massachusetts, c. 62, sec. 1, provides in part as follows: "Income of the classes described in subsections (a), (b), (c) and (e) received by any inhabitant of the commonwealth during the preceding calendar year, shall be taxed at the rate of six per cent per annum.

"(a) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

"First, Deposits in any savings bank chartered by the commonwealth or in the Massachusetts Hospital Life Insurance Company, or in the savings department of any trust company so chartered, and deposits in any bank situated in the state of New Hampshire, so long as the provisions of chapter one hundred and eighty-nine of the Public Acts of nineteen hundred and seventeen of that state remain in force, and deposits in any bank in any other state which exempts from taxation to its inhabitants similar deposits, and interest and dividends thereon, owned by such inhabitants in banks in this commonwealth.

"Second, Bonds, notes and certificates of indebtedness of the United States and such bonds, notes and certificates of indebtedness of the commonwealth and of political subdivisions thereof as are exempted from taxation by clause twenty-fifth of section five of chapter fifty-nine.

"Third, Loans secured exclusively by duly recorded mortgage of real estate, taxable as real estate, situated in the commonwealth, to an amount not exceeding the assessed

value of the mortgaged real estate less the amount of all prior mortgages.

"Fourth, Loans made in the course of business by persons subject to the provisions of sections seventy to eighty-five, inclusive, of chapter one hundred and forty.

"(b) Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except banks which are subject to taxation under section two of chapter sixty-three, and except such foreign corporations as are subject to a tax upon their franchises payable to the commonwealth under section fifty-eight of chapter sixty-three."

U.S.C. Title 12, sec. 1464 (h), provides that "no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

Statement.

The Appellate Tax Board, whose findings of fact are final (Massachusetts G.L. c. 58A, sec. 13), found that Edward H. Flaherty, the appellant before the Board, was at the time in question an inhabitant of Massachusetts and that during the year 1937 he received "interest on share accounts owned by him in the Worcester Cooperative Federal Savings and Loan Association" amounting to \$123.76 (R. p. 20). The Board subsequently in its findings refers to the amount so received on share accounts as "dividends" (R. p. 26) and the Supreme Judicial Court of Massachusetts in its opinion so refers to the amount (R. p. 37). The Commissioner of Corporations and Taxation assessed an income

tax of \$8.21 on this amount, being a tax at the rate of 6%, plus a 10% additional tax under the provisions of Massachusetts St. 1937, c. 422, and interest of 4 cents. Application for abatement being denied by the Commissioner of Corporations and Taxation, an appeal was taken to the Appellate Tax Board. The Board further found that said association "is a Federal savings and loan association chartered under Section 5 of the Home Owners' Loan Act of 1933 (C. 64, 48 Stat. 128), and is engaged in the business of making loans on the security of first liens upon homes or combinations of homes and business property, and to a limited extent on the security of first liens upon other improved real estate and on the security of its share accounts, its capital being derived from payments made on share accounts purchased by individuals, partnerships, associations and corporations for savings and investment purposes" (R. p. 21). After making certain findings with respect to its functions and business and the functions and business of Massachusetts cooperative banks (R. p. 22), the Board made the finding of fact that the said association was in direct competition with Massachusetts cooperative banks, the shares and income of which are exempt from taxation under the laws of Massachusetts (R. p. 24).

The Supreme Judicial Court of Massachusetts on appeal, passing solely upon questions of law, proceeded upon the assumption that, if the creation of federal savings and loan associations was a valid exercise of Congressional power and if the activities of such association are governmental functions, it was within the competency of Congress to prevent the states from taxing them. The court, however, concluded that the tax assailed did not offend the provisions of U.S.C. Title 12, sec. 1464 (h), because it is not assessed upon the association or its property but upon the receipt of income by an inhabitant of Massachusetts. The court then holds that, because the taxing act exempts dividends

received by an inhabitant from a Massachusetts cooperative bank, it discriminates against income received from a federal association and in favor of income received from a state cooperative bank, and that "such an exercise of the taxing power cannot be sustained."

Although the court does not specifically point out what constitutional provision is violated, its citations clearly indicate that it is declaring the Massachusetts statute invalid by reason of provisions of the federal constitution. As a matter of construction the court specifically states that the language of the statute "was broad enough to include the taxation of dividends received by the appellee" (R. p. 41).

Errors Relied On.

1. The Massachusetts court erred in its conclusion that there was no rational difference between income received by shareholders of federal savings and loan associations and that received by shareholders of Massachusetts cooperative banks that would justify taxing the former and exempting the latter.

2. The Massachusetts court erred in its conclusion that the tax discriminates against income received from a federal agency and in favor of income received from state cooperative banks and that such an exercise of the taxing power cannot be sustained.

3. The Massachusetts court erred in its conclusion that this case is controlled by principles laid down in *Miller v. Milwaukee*, 272 U.S. 713; *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515; *Macallen Co. v. Massachusetts*, 279 U.S. 620; *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239.

Reasons Relied on for the Allowance of the Writ.

The case involves the validity under the federal constitution of a tax statute of the Commonwealth of Massachusetts. Although the amount involved in the instant case is nominal, it is obvious that a determination of the case will also determine the rights of many other Massachusetts taxpayers having similar claims and will very considerably affect the revenue of the Commonwealth. Determination of the issue presented will also serve to indicate the limitations upon the taxing power not only of Massachusetts but of other states. It is submitted that, although the Massachusetts court rightly held that the Massachusetts tax law did not violate the immunity extended to federal instrumentalities, the court's conclusion that the law is discriminatory (presumably in violation of the Fourteenth Amendment of the federal constitution) is entirely unsupported by the decisions of the United States Supreme Court, which the Massachusetts court cites as its basis for such conclusion. The cases so cited are *Miller v. Milwaukee*, 272 U.S. 713; *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515; *Macallen Co. v. Massachusetts*, 279 U.S. 620; *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239. The first and third of these four cases tend to define what constitutes violation of the doctrine of immunity and in no way bear upon what constitutes discrimination under the federal constitution. Although the other two cases deal with the principle of discrimination, they are not analogous to the instant case. It is further believed that there exists no decision of this court which supports the conclusion of the Massachusetts court that the statute here involved is discriminatory within the purview of the federal constitution. As pointed out by the Massachusetts court, the Congressional Act in reference to savings and loan associations does not inhibit state taxation of income from the shares of such

an association. The tax is imposed on the shareholder because he, being an inhabitant of Massachusetts and enjoying the benefits of its government, has received income indicating an ability to contribute to the cost of supporting the government which has supplied him with those benefits. Such a tax does not constitute a prohibited imposition upon the instrumentality from which the dividend is received and, if non-discriminatory, is valid. The Massachusetts law exempted the recipient of dividends of Massachusetts cooperative banks from taxation thereon prior to the existence of federal savings and loan associations. It is submitted that adequate reasons exist for not extending such an exemption to the receipt of dividends paid by federal savings and loan associations, as is set forth in greater detail in the accompanying brief.

Wherefore it is respectfully submitted that this petition should be granted.

PAUL A. DEVER,
Attorney General.